Exhibit No. 11

IN REPLY REFER TO:
Real Property Mgmt
Tenure & Mgmt.
Burlington Norther
r/w

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Western Washington Agency
3006 Colby Avenue - Federal Building
Everett, WA 98201

October 3, 1977

RECEIVED
OCT 5 8 03 AM '77
BUREAU OF INDIAN AFFAIRS
PORTLAND AREA

50186

Memorandum

To: Area Director, Portland Area
Attention: Real Property Mgmt.

From: Superintendent, Western Washington Agency

Subject: Burlington Northern Inc. Application for Railroad Right-of-Way across Swinomish Tribal Tidelands.

Enclosed for your information and action is the subject application along with the stipulation, appraisal, original and two copies of the map, letter of transmittal dated August 15, 1977 and tribal resolution #77-08-464, Western Washington interoffice memorandum of April 19, 1977 covering tribal resolution #77-3-431, Western Washington letter dated September 28, 1977, copy of check #2411 and a copy of Western Washington letter dated October 3, 1977.

Our letter of September 28, 1977 to Burlington Northern acknowleged receipt and returned their check certified mail for safe keeping. The local review finds this case to be lacking under current CFR regulations in that;

1. The appraisal has not been reviewed by the Bureau of Indian Affairs appraisal staff.

2. The landowners have not concurred. In fact the tribe organized under the IRA has gone on record in tribal resolution #77-08463 in requesting removal of said railroad.

As this case is in litigation, please advise if this office can be of further assistance.

Superintendent

CONSERVE AMERICA'S ENERGY

Save Energy and You Serve America!

Exhibit No. 12

Native American Rights Fund

1506 Broadway • Boulder, Colorado 80302 • (303) 447-8760

October 5, 1977

OCT 7 1977

Mr. John Benedetto
Superintendent
Western Washington Agency
Bureau of Indian Affairs
United States Department of the Interior
3006 Colby Avenue - Federal Building
Everett, Washington 98201

Re: Application by Burlington Northern, Inc. for a Railroad Right-of-Way Across the Swinomish Reservation.

Dear Mr. Benedetto:

We recently received a copy of an application submitted to the Western Washington Agency by Burlington Northern, Inc. for a railroad right-of-way across the Swinomish Reservation. The application states that it is being made pursuant to the Act of March 2, 1899, 30 Stat. 990 (25 U.S.C. §312, et seq.) and that tribal consent is not required even though the Act of February 5, 1948, 62 Stat. 17 (25 U.S.C. §323, et seq.) requires such consent. For some time now the Native American Rights Fund has been representing the Swinomish Tribal Community in negotiations with Burlington Northern for a right-of-way across tribal lands. It is the Tribal Community's position that it is an absolute requirement that tribal consent be obtained before the granting of a right-of-way across Swinomish lands. This position is supported by the applicable statutes and regulations governing rights-of-way across Indian lands and by present federal Indian policies. Enclosed is a memorandum outlining our research on the issue of the necessity of tribal consent for the granting of railroad rights-of-way, particularly where the tribe is organized under the Indian Reorganization Act, 25 U.S.C. §461, et seq. The Swinomish Tribal Community was organized under the Act in the 1930's.

Recently NARF represented the Walker River Paiute Tribe of Indians in a trespass action against Southern Pacific Transportation Company. Subsequent to a Ninth Circuit Court of Appeals decision establishing liability on the part of the

railroad, Southern Pacific applied to the Western Nevada Agency for a right-of-way across the Walker River Reservation pursuant to the 1899 Act, without tribal consent. The Western Nevada Superintendancy agreed with NARF and refused to grant the right-of-way without tribal consent. The matter has been appealed by Southern Pacific to the Portland Area Office. The above memorandum was done in connection with that appeal.

The Swinomish Tribal Community is very concerned that a right-of-way not be granted to Burlington Northern, Inc. without the Tribe's consent. If you need any additional information concerning the Tribe's position, please feel free to contact me.

Sincerely yours,

Jeanne S. Whiteing

JSW/clr
Enclosure

cc: Landy James, Chairman
Michael Moyer, Planning Director

MEMORANDUM

RE: The Requirement of Tribal Consent for Railroad Rights-of-Way

TRIBAL CONSENT IS A PRECONDITION TO THE GRANTING OF A RAILROAD RIGHT-OF-WAY

The Railroad argues that the grant of a railroad right-of-way is governed solely by the terms of the 1899 Act,[1] and not by the terms of the 1948 Act.[2] This is clearly wrong. As a matter of law, the 1899 Act must be construed together with the 1948 Act. Read together the conclusion is clear that, under present law, tribal consent is a precondition to any railroad right-of-way grant, where the tribe involved is organized pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461, et seq., and in particular §476. See, 25 U.S.C. §324.

The legislative history of the 1948 Act shows beyond question that Congress enacted the 1948 Act on the specific recommendation of the Secretary of the Interior that there was a real need "for simplification and uniformity" in the administration of grants of rights-of-way of any nature over Indian lands." See, S. Rept. No. 823, 1948 U.S. Code and Administrative

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[1] Act of March 2, 1899, 30 Stat. 990, 25 U.S.C. §§312, et seq.

[2] Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. §§323, et seq.

News 1033, 1036. The suggestion for a general right-of-way act was initiated by the Secretary of the Interior in a report on a bill dealing solely with the administration of rights-of-way grants over the Osage Reservation. The Secretary's report suggested "that there is a real need for additional legislation relating not only to the right-of-way on Osage Indian lands but also to the rights-of-way on Indian lands on all reservations . . . ." S. Rept. No. 823, supra at 1034. The text of the 1948 Act as finally adopted is the same as the bill drafted by the Secretary and attached to his report and recommendation for general right-of-way legislation. Id.

The Secretary traced his problems in granting rights-of-way to the fact that his authority to grant any right-of-way

> . . . is contained in many acts of Congress, dating as far back as 1875. Thus, each application for a right-of-way over Indian land must be painstakingly scrutinized in order to make certain that a right-of-way sought falls within a category specified in some existing statute, which may limit the type of right-of-way that may be granted, or the character of the land across which it may be granted.

Id. at 1036. The Secretary further pointed out that certain acts were applicable to specific types of Indian lands and not to others for no valid reason. And finally, the Secretary stated that in many instances when no statutory authority could be found for a particular right-of-way grant, the Secretary was forced to spend an inordinate amount of time and expense obtaining the signatures of all owners of interests in land to obtain an easement deed. The time and expenses were generally

not justified by the benefits obtained from the right-of-way. Id.

Thus, the 1948 Act was specifically designed to address the administrative problems of the Secretary in granting rights-of-way over Indian lands caused by the existence of so many special statutes governing specified rights-of-way over Indian land. The 1948 Act addresses the problems outlined by the Secretary essentially by vesting in the Secretary the power to make grants of rights-of-way of all kinds across Indian lands as well as the power to establish the conditions for such grants. Presumably the regulations implementing the Act would simplify and provide uniformity in the granting of rights-of-way across Indian lands.

The 1948 Act does expressly preserve existing statutory authority for rights-of-way, including the 1899 Act. The legislative history reveals that the reason for such preservation was "to avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new . . ." Id. A second reason was presumably to avoid any question as to the Secretary's authority which might have arisen from a repeal of the preexisting statutes on Indian rights-of-way.[3/]

[3/] Indeed a strong argument can be made that the pre-existing acts were as a matter of law repealed, except to the extent such acts authorized the Secretary to grant specific rights-of-way. In such an instance, the Secretary would not be bound to adopt as conditions those set forth in the pre-existing acts.

Accordingly, the regulations promulgated pursuant to the 1948 Act establish a uniform procedure for the administration of right-of-way grants over Indian lands, but preserve certain provisions of preexisting right-of-way statutes which the Secretary has determined do not affect the uniform administration of right-of-way grants across Indian lands. See, 25 C.F.R. Part 161.

It is clear from the above described legislative history of the 1948 Act that the intention of Congress was to authorize the Secretary by regulation[4/] to effect the simplifi- and uniformity of the multitide of statutes authorizing rights-of-way over Indian lands, including the 1899 Act. Moreover, the 1948 Act expressly refers to all such preexisting statutes by stating "nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed." 25 U.S.C. §326. Furthermore, §324 expressly incorporates as part of the 1948 Act the protection afforded tribes organized under the Indian Reorganization Act "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; . . ." 25 U.S.C. §476.

As stated by the Ninth Circuit in Stevens v. C.I.R., 452 F.2d 741, 744 (1971):

[4/] 25 U.S.C. §328 authorizes the Secretary "to prescribe any necessary regulations for the purpose of administering the provisions of sections 323-327 of this title."

> Federal policy toward particular Indian tribes is often manifested through a combination of general laws, special acts, treaties, and executive orders. All must be construed in pari materia in ascertaining congressional intent. [Emphasis added.]

The instant case is even simpler because the congressional intent as to the administration of grants of rights-of-way over Indian lands is clear from the legislative history and from the terms of the 1948 Act itself. Plainly Congress intended that the 1948 Act effectuate a consolidated, simplified and manageable system of granting rights-of-way across Indian lands to replace the then existing fragmented and unmanageable system. Thus, the 1948 Act, the 1899 Act and all other pre-existing statutes specially authorizing the grants of rights-of-way of any nature across Indian lands, and the Indian Reorganization Act of 1934, constitute parts of a single congressional system governing grants of rights-of-way over Indian lands. Those statutes are therefore in pari materia and must be so construed. See, e.g., Stevens v. C.I.R., supra; Kirkwood v. Arenas, 243 F.2d 863, 866-867 (9th Cir. 1957); United States v. Jackson, 280 U.S. 194, 196, 74 L.Ed. 361, 367 (1930); United States v. Fixico, 115 F.2d 389, 393 (10th Cir. 1940); and see generally, 2A Sutherland Statutory Construction, §§51.01-51.05 at 289-320 (1973 Cum.Supp. 1977).

Finally, the following principle of construction is pertinent to the construction of the 1899 Act and the 1948 Act:

> It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently

> given to a statute by the Executive Department charged with its administration [citations omitted] and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required.

United States v. Jackson, supra at 193. Accord, Stevens v. C.I.R., supra at 746.

Construing all applicable statutes together in light of the intent of Congress in enacting the 1948 Act, and giving weight to their interpretation by the Department of the Interior and Interior's long established practice, the conclusion is inescapable that the consent of tribes organized under 25 U.S.C. §476 of the Indian Reorganization Act is a precondition to any grant of a railroad right-of-way across the tribal lands. This conclusion is, of course, expressly incorporated into the regulations of the Secretary pursuant to the 1948 Act at 25 C.F.R. §161.3(a) which states:

> No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe.

THE 1899 ACT READ TOGETHER WITH 25 U.S.C. §476 OF THE INDIAN REORGANIZATION ACT MEANS THAT TRIBAL CONSENT IS A REQUIRED PRECONDITION TO A GRANT UNDER THE 1899 ACT.

Assuming that the 1948 Act does not apply to railroad rights-of-way grants, an assumption which we think is clearly unsupportable, the 1899 Act must nevertheless be read together with 25 U.S.C. §476 of the Indian Reorganization Act. 25 U.S.C. §476 states in pertinent part:

> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe [pursuant to the IRA] shall also vest in such tribe or its tribal council the following rights andpowers: . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe.

In construing the effect of the above language as a limitation on the granting of rights-of-way across Indian lands, the Solicitor for the Interior Department in 1936 declared:

> The only limitations which the Reorganization Act imposes upon the exercise of authority conferred by such specific acts of Congress are: (a) a tribe organized under section 16 may veto the grant under the broad power given it by that section 'to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe' and (b) a tribe incorporated under section 17 may be given the power to make such grants without restriction.

Memo. Sol. I.D., September 2, 1936, quoted in Cohen, Handbook on Indian Law, 105 (1942 ed.).

Based on the above Solicitor's opinion, Cohen in the 1942 edition of the Handbook on Indian Law states:

> [I]t would appear that section 16 of the act requires the consent of an organized tribe to any grant of right-of-way which the Secretary is authorized to make.

Cohen, at 105.

Subsequently, in the 1956 version of Cohen's Handbook, the Department of the Interior confirms Cohen's opinion by adding after the previous statement: "Any doubt that may have existed [as to whether the IRA requires tribal consent to

grants of rights-of-way] was resolved by the act of February 5, 1948 [25 U.S.C. §324]." Handbook of Federal Indian Law at 62 (1956 ed.).

Indeed the legislative history of the 1948 Act expressly states that the Act "preserves the powers of those Indian tribes organized under the Indian Reorganization Act of 1934 . . . with reference to the disposition of tribal land." [Emphasis added.] S. Rept. No. 823, supra at 1036. The unmistakable implication from this language is that prior to the 1948 Act, IRA tribes had the power to veto grants of rights-of-way of any nature, and Congress wished to make it clear that the 1948 Act did not abrogate that existing power.

Therefore Indian tribes organized under 25 U.S.C. §476 have the power under that section to consent or not consent to any proposed grant of a railroad right-of-way under the 1899 Act. 25 C.F.R. §161.3 simply reflects the existence of that power, and provides a place for it in the procedural scheme of such grants.

Exhibit No. 13

Real Property Mgmt.
Tenure & Mgmt.
Pending Right-of-way
Swinomish General

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Western Washington Agency
3006 Colby Ave., Federal Building
Everett, Washington 98201

October 17, 1978

Burlington Northern Railroad Company
Attention: Lawrence D. Silvernale,
Associate Regional Counsel
350 Central Building
Seattle, WA 98104

Gentlemen:

The Swinomish Indian Senate in session on October 3, 1978, resolved that the Swinomish Indian Tribal Community refuses to authorize the Secretary of the Interior to grant an easement for the right-of-way, applied for by the Burlington Northern Railroad Company. As tribal consent is required under both the law and the regulations, we have no choice but to deny the application. Accordingly, by copy of this letter, we will notify our Portland Area Office to return your original application and attachments thereto without approval.

Sincerely yours,

Superintendent

EXHIBIT A

CONSERVE AMERICA'S ENERGY

Save Energy and You Serve America!

Exhibit No. 14

RESOLUTION NO 78-10-554

Rejecting Burlington Northern Railroad Company's request for right-of-way across the Swinomish Indian Reservation.

WHEREAS The Swinomish Indian Reservation was established by the Treaty at Point Elliott in 1855, and the Northern boundry was redefined by an Executive Order in 1873; and

WHEREAS the Swinomish Indian Tribal Community is a federally recognized Tribe, organized under a constitution and By-Laws approved by the Secretary of the Interior pursuant to the Indian Reorganization Act; and the Swinomish Indian Senate is the duly constituted governing body of the Swinomish Indian Tribal Community; and

WHEREAS The Seattle and Northern Railroad Company constructed a railroad across tidelands owned by the Swinomish Indian Tribal Community in 1889 without authority from the Commissioner of Indian Affairs and the Swinomish Indian Tribal Community; and

WHEREAS The Burlington Northern Railroad Company is the latest in a continuous stream of successors in-interest to own and use said railroad without proper authorization from the Swinomish Indian Tribal Community, and the United States; and

WHEREAS the Burlington Norther Railroad Company has applied to the Secretary of the Interior for permission to cross Swinomish Indian Tribal Community tidelands, pursuant to the Act of March 2, 1899; and

WHEREAS the Secretary cannot grant such an application without the approval of the Tribe involved; and

WHEREAS The Swinomish Indian Senate has already resolved (Nos. 77-12-487 and 77-08-463) that suit should be brought by the Tribe and the United States against Burlington Northern Railroad Company for ejectment and damages;

NOW THEREFORE BE IT RESOLVED by the Swinomish Indian Senate in session this 3rd day of October, 1978, with a quorum present that the Swinomish Indian Tribal Community refuses to authorize the Secretary of the Interior to grant an easement for the right-of-way to the Burlington Northern Railroad Company for the aforesaid railroad located on Swinomish Tribal tidelands.

BE IT FURTHER RESOLVED that the Senate does hereby renew Resolutions # 77-12-487 and 77-08-463, urging the United States government to inter immediate action in its capacity as our trustee to remove the trespasser, Burlington Northern Railroad Company from our Tribal tidelands

Randy James, Chairman
Swinomish Indian Senate

Nancy Wilbur, Secretary

RESOLUTION # 78-10-554

CERTIFICATION

As Secretary of the Swinomish Indian Senate, I hereby certify that the above resolution was enacted at a regular meeting of the Swinomish Indian Senate, held at LaConner, Washington, on the day of 1978, at which time a quorum was present, by a vote of 7 for and 0 against.

Nancy Wilbur, Secretary
Swinomish Indian Senate

Exhibit No. 15

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

SWINOMISH TRIBAL COMMUNITY, Plaintiff, v. BURLINGTON NORTHERN, INC., Defendant.	No. COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

The plaintiff, Swinomish Tribal Community, alleges:

1. This Court has jurisdiction in this matter pursuant to 28 U.S.C. §§ 1362 and 1331. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

2. Declaratory and injunctive relief is requested pursuant to 28 U.S.C. §§ 2201 and 2202.

3. Plaintiff Swinomish Tribal Community is the successor in interest to certain tribes, bands, and groups of Indians which were parties to the Treaty of Point Elliott. The Swinomish Tribal

Senate is duly recognized by the Secretary of the Interior as the governing body of the Swinomish Indian Reservation and is organized pursuant to § 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. § 476.

4. Defendant Burlington Northern, Inc. is a corporation incorporated under the laws of the State of Delaware and is duly licensed and doing business within the State of Washington as a railway carrier.

5. The Swinomish Indian Reservation was established by the Treaty of Point Elliott between the United States and the Dwamish, Suquamish, and other allied and subordinate tribes of Indians in Washington Territory, dated January 22, 1855, ratified on March 8, 1859, proclaimed by the President on April 11, 1859. 12 Stat. 927. The Treaty of Point Elliott (Article 2) secured and confirmed the Swinomish Tribal Community's predecessors in the possession of a portion of their aboriginal lands described as "the peninsula at the southeastern end of Perry's Island called Sh'ais-quihl". The Reservation includes, at a minimum, the western one-half of the Swinomish Channel on the east and all surrounding and adjacent tidelands.

6. During all times since 1855, the tidelands surrounding and adjacent to the upland portions of the Swinomish Indian Reservation were, and are, held in trust by the United States on behalf of the Swinomish Tribal Community.

7. A railway and bridge and appurtenant facilities were constructed across the Swinomish Channel and the tidelands on the

northern portion of the Swinomish Indian Reservation by the Seattle and Northern Railway Company in 1890. Burlington Northern, Inc. is the successor in interest to the Seattle and Northern Railway Company. The railway is presently in use and is maintained and operated by Burlington Northern, Inc.

8. No grant of a right-of-way across the tribally owned tidelands has been made by the Swinomish Tribal Community or the United States to defendant Burlington Northern, Inc. or its predecessors. Burlington Northern, Inc. and its predecessors have been trespassing on these lands from 1890 to the present.

9. By constructing the railway through tribal lands, the defendant gained the benefit of greatly reduced cost in the construction and annual maintenance of the railway. Such benefit would not have been gained if the railway facilities had been constructed north of the Reservation. As a result of said wrongful use and occupation of tribal lands, Burlington Northern, Inc. and its predecessors have been unjustly enriched.

10. By constructing the railway through these tribal tidelands, the defendant severely damaged a prime traditional mussel and shellfish gathering grounds of the Indians residing on the Swinomish Indian Reservation.

11. Plaintiff has no adequate remedy at law to protect itself from said future and presently continuing trespasses except by filing a multiplicity of suits. In addition, there is a grave danger of irreparable damage to the land and the fishery in Padilla Bay and the Swinomish Channel, upon which the Swinomish Tribal

Community relies as their major source of economic stability, should a derailment or accident occur.

WHEREFORE, plaintiff Swinomish Tribal Community prays for the following relief against defendant Burlington Northern, Inc.:

1. A permanent injunction against the continuing trespass by defendant;

2. A judgment against defendant for the possession of said tidelands and channel;

3. Monetary damages for trespass, unjust enrichment of the defendant and/or restitution for use and occupation of the land; and

4. For costs and such further and additional relief as the Court may deem necessary.

DATED: July 18th, 1978.

Respectfully submitted,

SHARON K. EADS
ROBERT S. PELCYGER
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

By Sharon K. Eads
Sharon K. Eads

PETER J. WILKE
Swinomish Tribal Community
P. O. Box 416
La Conner, Washington 98257
(206) 466-3185

By _____
Peter J. Wilke

Attorneys for Plaintiff

Exhibit No. 16

4.

STATE OF WASHINGTON } ss.
COUNTY OF KING

The undersigned, being first duly sworn, on oath states: That on this day affiant deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff ~~defendant~~ containing a copy of the document to which this affidavit is attached.

Mavis J. Gates

Subscribed and Sworn to before me this 12 day of Sept. 19 78.

Jane B. Gough
Notary Public for Washington
Residing at Seattle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

SWINOMISH TRIBAL COMMUNITY, Plaintiff, vs. BURLINGTON NORTHERN INC., Defendant.	NO. C78-429V ANSWER AND COUNTERCLAIM FOR INJUNCTIVE AND DECLARATORY RELIEF

COMES NOW defendant Burlington Northern Inc., and in answer to plaintiff's complaint states as follows:

I.

Answering paragraphs 1, 2, 3 and 4 of plaintiff's complaint, defendant admits the same.

II.

Answering paragraphs 5, 6, 7, 8, 9, 10 and 11 thereof, defendant denies each and every allegation therein contained.

WHEREFORE, defendant prays that the plaintiff's complaint be dismissed and that defendant recover its costs.

FOR FURTHER ANSWER AND BY WAY OF AFFIRMATIVE DEFENSE, defendant alleges:

WOODROW L. TAYLOR
LAWRENCE D. SILVERNALE
GEORGE C. INMAN, JR.
ROBERT C. WILLIAMS
GERALD A. TROY
350 Central Building
Seattle, Washington 98104
Telephone: (206) 625-6444

I.

Burlington Northern Inc. holds a right of way for railroad and telegraph purposes as constructed at all points on or adjacent to said Swinomish Indian Reservation.

II.

If Burlington Northern's right of way for railroad crosses lands over which it does not have record ownership, easement or other interest, there exists an implied license for said right of way.

III.

If Burlington Northern's right of way for railroad crosses lands owned by or held for the benefit of plaintiff, defendant has a valid right of way pursuant to the terms and provisions of the said Treaty of Point Elliott, which provides in part in Article 2:

> "If necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them."

IV.

If defendant's right of way for railroad crosses lands owned by or held for the benefit of plaintiff, defendant has obtained an easement for right of way purposes by the construction of its railway in 1890 and its application for right of way under the Act of March 2, 1899 (25 U.S.C. 312 et seq., or other applicable statutory right of way grants.

V.

The claims of the plaintiff are barred by laches, estoppel, waiver and the running of the applicable statutes of limitation.

VI.

If it be determined that defendant railroad has no valid right of way and that the lands over which it operates are owned

by or held for the benefit of the plaintiff, and further that plaintiff Tribal Community's consent to railroad right of way is essential, said plaintiff Tribal Community has arbitrarily and capriciously refused its consent in violation of the U.S. Constitution and the Indian Civil Rights Act, 25 U.S.C. 1302.

VII.

In respect to areas occupied by defendant's bridge and approaches over the Swinomish Channel, such premises constitute navigable waters of the United States subject to the jurisdiction of the United States Government, and defendant's bridge and approaches were lawfully constructed with plaintiff's knowledge and consent pursuant to a valid Federal permit.

VIII.

The plaintiff has failed to state a claim upon which relief can be granted.

CROSS-COMPLAINT OF BURLINGTON NORTHERN FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES

I.

This court has jurisdiction in this matter pursuant to 28 U.S.C. 1331, 1332, 1343(4) and 1362.

II.

Declaratory and injunctive relief is requested pursuant to 28 U.S.C. 2201 and 2202.

III.

Burlington Northern (hereinafter BN) is a Delaware corporation which owns and operates a transcontinental line of interstate common carrier railroad through, over and across the United States and Canada. The railroad line herein disputed is an integral part thereof and substantial shippers, receivers and communities rely on the rail service provided.

Cross-claim defendant is the governing body of the Swinomish Indian Reservation organized under 25 U.S.C. 476 (hereafter referred to as Tribal Community).

IV.

In the vicinity of the tidelands and Swinomish Channel herein involved, said railroad was located and constructed in 1890 by BN's predecessor. BN has a valid easement for railroad and telegraph right of way purposes over and across said premises pursuant to said location and construction, pursuant to said treaty and the general right of way statutes or other basis as pleaded by BN in its affirmative defenses to Tribal Community's complaint.

V.

The Tribal Community has no right, title or interest in or to said tidelands and channel, or if said Tribal Community has an interest in said tidelands or channel, said Tribal Community has acquiesced in the location, construction and reconstruction of BN's railroad and telegraph lines, or alternatively, said Tribal Community's refusal to consent to said right of way constitutes an arbitrary and capricious exercise of discretion in violation of 25 U.S.C. 1302.

VI.

The Tribal Community has, since 1975, embarked upon a program of attacking holders of public utility, pipeline, railroad and other rights of way on or near said reservation with threats to interfere with said public utility, pipeline or railroad operations. Said activities include threats to interfere with BN operations and demands for payment of large sums of money for tribal consent to the continuation of said rights of way.

VII.

The construction and operation of BN's railroad right of way over and across the tidelands in question since 1890 has resulted in significant benefits to the Tribal Community in that the Tribal Community's lands are served by railroad facilities and such facilities have permitted the Tribal Community to develop an industrial site adjacent to said railroad premises.

VIII.

BN has no adequate remedy at law to protect itself from future and continuing threats to interfere with its operations. Temporary or permanent interruption of BN's common carrier railroad operations and service to the Tribal Community's lands and to railroad users east and west of said reservation would result in irreparable damage to the shipping and receiving public, several communities, BN and to the citizens of the United States.

WHEREFORE, Burlington Northern prays for the following relief against said Swinomish Tribal Community:

1. A permanent injunction against activities or threats to interfere with BN's railroad right of way and railroad operations.

2. A judgment against said Tribal Community for the possession and use of said railroad and telegraph right of way.

3. Monetary damages in amounts to be proved for the Tribal Community's wrongful interference with BN's operation of its railroad right of way.

4. For costs and such further and additional relief as the court may deem necessary.

DATED this 11th day of September, 1978.

Lawrence D. Silvernale

Lawrence D. Silvernale
Of Attorneys for Defendant
and Cross-Claim Plaintiff
Burlington Northern Inc.

Exhibit No. 17

BURLINGTON NORTHERN

Woodrow L. Taylor, 625-6441
Regional Counsel

Lawrence D. Silvernale 625-6444
Associate Regional Counsel

George C. Inman, Jr. 625-6440
Robert C. Williams 625-6447
Assistant Regional Counsel

Gerald A. Troy 625-6448
General Attorney

November 10, 1978

Area Director
Bureau of Indian Affairs
P.O. Box 3621
Portland, Oregon 97208

Dear Sir:

Enclosed is the appeal of Burlington Northern Inc. from the decision refusing to file an application for right of way through the Swinomish Indian Reservation, Washington.

Very truly yours,

Lawrence D. Silvernale
Associate Regional Counsel

LDS/mb

Encl.

cc: Mr. P. P. Threestars
Office of the Solicitor, Portland Region
Ms. S. K. Eads, Native American Rights Fund
Mr. P. J. Wilke, Swinomish Tribal Community

Woodrow L. Taylor
Lawrence D. Silvernale
350 Central Building
Seattle, Washington 98104
Telephone: (206) 625-6444

Attorneys for Appellant

DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

In the Matter of Appeal of)
Burlington Northern Inc. from)
Decision Refusing to File an)
Application for Right of Way)
Through the Swinomish Indian)
Reservation, Washington.)
)

APPEAL OF BURLINGTON NORTHERN INC.

Burlington Northern Inc. (hereinafter BN or Appellant) appeals to the Area Director from the decision of October 17, 1978, of the Superintendent of the Western Washington Agency to reject for filing Burlington Northern's application for railroad right of way through tribal lands of the Swinomish Indian Tribal Community in the Swinomish Indian Reservation, Washington.

STATEMENT OF THE CASE

Burlington Northern Inc. tendered for filing on September 27, 1977, with the Western Washington Agency an application for

a railroad right of way under the Act of March 2, 1899, Chapter 374, 30 Stat. 990 (25 U.S.C. 312 et seq.), through the tribal land within the Swinomish Indian Reservation. Duplicate originals of the application, original tracing linen and reproductions of the map of definite location and all other documents tendered to the Agency, including voucher for payment of estimated compensation, are herewith re-tendered to the Area Director accompanying this appeal.[1]

By letter dated October 17, 1978, copy attached as Exhibit A, the Superintendent of the Western Washington Agency refused to file the foregoing documents, advising that without tribal consent he had no choice but to deny the application and that with a copy of his letter he notified the Portland Area Office to return BN's original application and attachments thereto without approval. Although the original application with attachments has not as yet been returned to Burlington Northern, BN treats the Superintendent's letter as a rejection of its application.

By letter dated November 2, 1978, received by the Agency on the 3rd day of November, 1978, BN filed with the Superintendent its timely notice of appeal of the decision rejecting the tendered filing. Copy of the notice of appeal is attached as Exhibit B. Also filed with this appeal is a certificate of service of the notice of appeal on interested parties, attached as Exhibit C.

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[1]As of this writing Appellant's original application and attached documents have not been returned. All will be resubmitted to the Area Director when or if returned. Appellant's voucher for payment of estimated compensation is herewith resubmitted.

STATEMENT OF FACTS

The railroad in question was constructed in 1890 by the Seattle and Montana Railroad Company. The line was subsequently acquired by Great Northern Railway Company, which, through merger, became Burlington Northern Inc. in 1970. In recent years the Swinomish Indian Tribal Community, represented by attorneys from a group known as the Native American Rights Fund, has contended that BN does not have a valid right of way over and across tidelands adjacent to the Swinomish Indian Reservation. Although BN believes it has a valid right of way over the tidelands in question and further that the Swinomish Tribe does not own the tidelands, nevertheless BN seeks, by its application for right of way, to put to rest any question as to right of way ownership.

The application and map rejected by the Western Washington Agency Superintendent seeks rights only through tribal land and does not affect allottee land. The application is for a 60 foot right of way 3,029 feet long plus a right of way over the Swinomish Slough and for telephone and telegraph lines along the right of way. The application is filed under the Act of March 2, 1899, Chapter 374, 30 Stat. 990 (25 U.S.C. 312 et seq.).

STATEMENT OF REASONS IN SUPPORT OF APPEAL

The reason given for rejection of the filing as set forth in the attached letter of the Superintendent is lack of tribal

consent to the grant. In response to this objection, Appellant states as follows:

I. Tribal consent to the grant is not required because the Act of 1899 is a grant in praesenti, not conditioned on such consent.

The language of the Act of 1899 is that of a grant in praesenti: "A right of way for a railway, telegraph and telephone line through any Indian reservation . . . is granted to any railroad company . . ." Act of March 2, 1899, Chapter 374, Section 1, 30 Stat. 990 (25 U.S.C. 312) (emphasis ours). The operation of grants in praesenti was well understood at the time of passage of the 1899 Act. The language imports a present grant. It passes a present title, not a promise to transfer one in the future. Schulenberg v. Harriman (1875), 21 Wall. 44; St. Paul & P. R. v. Northern Pac. R. (1891), 139 U.S. 1. If one or more of the factors necessary to attachment of the grant is lacking, e.g., lack of definite grantee or route, when these items become ascertained the grant attaches. Jamestown & Northern R. v. Jones (1900), 177 U.S. 125. By way of comparison, in practically contemporaneous legislation Congress adopted for highways through reservations a system, not of a present grant, but of discretionary permission from the Secretary. Act of March 3, 1901, Chapter 832, Section 4, 31 Stat. 1084 (25 U.S.C. 311).

In response to the foregoing contention, the 9th Circuit held, in United States v. Southern Pacific Transportation Company (CA 9-1976) 543 F.2d 676, not that the Act is not a grant in

praesenti, but that merely filing articles of incorporation is not sufficient, and that, "the grantee must in addition comply with all the provisions of the Act including the requirements that maps be filed and approved and that compensation be paid to the Indians." Indeed, in view of the many Supreme Court cases construing like acts, the 9th Circuit could hardly hold that the Act of 1899 was not a grant in praesenti. The effect of tendering the instant application is to comply with all the provisions of the Act, i.e., maps, compensation, etc. Translated into contemporary terms, when all the requirements of the Act are met, the in praesenti effect is to remove from the Secretary any discretion he might have. The grantee becomes entitled to the legislative grant. On the one hand, tribal consent is not called for by the Act, while on the other hand, all the requirements of the Act (and of the 9th Circuit's interpretation of it) are met by the application and map which have been tendered.

II. Tribal consent is not required by the Act. The regulation requiring it is inconsistent with the Act.

25 CFR 161.3 states, "No right-of-way shall be granted over and across any tribal land . . . without the prior written consent of the tribe."

A reading of the terms of the Act discloses the first important fact about this regulation: nowhere does the Act call for tribal consent. In contrast, other acts granting rail rights of way in Indian reservations do call for tribal consent. Act of

July 26, 1866, 14 Stat. 289, Section 8. Thus Congress chose not to impose a consent requirement in this general Act.

In the second place, because of its in praesenti mode, for the Secretary to impose additional substantive requirements not present in the Act itself thwarts the operation of the Act, and is thus inconsistent with it.

Finally, a comparison of the Act of 1899 with the Right of Way Act of 1948 (Act of Feb. 5, 1948, Chapter 45, 62 Stat. 17, 25 U.S.C. 323 et seq.) indicates that Congress reaffirmed its decision not to require tribal consent under the 1899 Act. The 1948 Act specifically provides that as to certain recognized tribes, "No grant of a right-of-way . . . shall be made without the consent of the proper tribal officials." (25 U.S.C. 325). In contrast the Act of 1899 requires, "In case objection to the granting of such right of way shall be made, said Secretary shall afford the parties so objecting a full opportunity to be heard." (25 U.S.C. 312). Objecting parties were granted a hearing, but not a veto by withholding consent. Congress expressly kept existing acts on the statute books. The Act of 1948 states:

> " . . . nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed."
> 25 U.S.C. 326

The regulation requiring tribal consent is thus inconsistent with and outside the scope of the Act of 1899, and not reasonably necessary to effectuate the purposes of the Act.

The legislative history of the 1948 Act contained in the U.S. Code and Congressional Report clearly evidences an intent

that the 1899 and other specific right of way acts were neither superseded nor repealed by the 1948 Act. In addition to the specific proviso preserving the existing acts, the official Bureau of Indian Affairs explanation to Congress in a letter written to the President of the Senate on July 22, 1947, 1948 U.S. Code/Congressional Report, pp. 1036, 1037, Undersecretary of the Interior Oscar Chapman explained that the purpose of the bill was to simplify and liberalize the process of approving right of way applications in specific situations, while at the same time preserving all existing statutory authority relating to rights of way over Indian lands. The most that can be said of the 1948 statute is that it gave the Department of the Interior a procedure for simplifying right of way grant procedures in circumstances where prior statutory authorities were complex or conflicting and where the tribe consented to the grant.

This issue was before the 9th Circuit in Nicodemus v. W.W. Power, 264 F.2d 614. There the Indian allottees argued that Section 323 of Title 25 (the 1948 Act) provided the exclusive method of obtaining a power line easement and that the consent of the Secretary of the Interior was a prerequisite. The 9th Circuit held that Congress had provided two methods of acquisition of such easements and that the subsequent enactment of the 1948 law did not repeal or diminish the right of condemnation granted in the Act of 1901 (25 U.S.C. 357).

IV. Under the facts of this case it would be an abuse of discretion for the Secretary to deny the legislative grant.

Assuming, arguendo, that the Secretary has discretion to refuse the legislative grant even after all the requirements of the Act have been met, it would be an abuse of discretion for him to do so in the facts of this case. The "facts" which Appellant is prepared to prove are as follows:

> The rail line has been in continuous operation since 1890. No additional operations or uses have been imposed that have not been present for the entire life of every person who might be affected by the presence of the line. The people in the reservation are not subjected to any greater danger, noise, etc., than any other persons situated near the Burlington Northern's line in any other rural community.
>
> Although the Swinomish Tribal Community is duly recognized by the Secretary of the Interior as the governing body of the Swinomish Indian Reservation organized pursuant to Section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. 476, and presumably has long had knowledge of its claim to own the tidelands adjacent to said reservation, said tribe made no effort to oppose or alter the U.S. Army Corps of Engineers' permit for the reconstruction of Appellant's railroad bridge in 1950.

This railway line provides the only rail service to Anacortes, Washington, a substantial community which includes numerous rail-served industries, including two large oil refineries. Said Swinomish Tribal Community permitted persons in the vicinity of Anacortes to make large investments in plants and facilities located on the railroad line providing a significant source of employment to that community. Such industries are economically tied to rail service for their continued existence.

This railway line provides the only rail service to the Swinomish Indian Reservation and to Anacortes and its vicinity. The United States Government has granted the Swinomish Tribal Community substantial sums ($750,000) for the development of an industrial park adjacent to Appellant's line of railway. The grant was predicated in substantial part on the availability of rail service--the very service to which the Tribal Community now arbitrarily and unreasonably refuses its consent to a right of way grant.

In view of the extraordinary costs of new rail construction and the fact that any railroad to Anacortes must pass over the Swinomish Indian Reservation or

its claimed tidelands, it is impossible to provide rail service to said reservation or Anacortes, Washington, without crossing reservation owned or claimed lands.

In view of the foregoing, if the Secretary has discretion to deny the legislative grant, it would be an abuse of discretion for him to do so.

Moreover, if one argues that the Secretary has an area of discretion, this becomes an additional argument against the validity of the regulation requiring tribal consent. An agency with discretionary power to decide cases must act case by case and may not limit its discretion by general rules. Work v. United States ex rel. Mosier (1923) 261 U.S. 352; Herkness v. Irion (1928) 278 U.S. 92. Here the regulations (requiring tribal consent) is outside anything required by the legislation and acts to thwart the proper exercise of any discretion.

If the Secretary has an area of discretion to reject Appellant's application for right of way under the Act of 1899, it is a manifest abuse of discretion to deny the application for lack of tribal consent based solely on Appellant's refusal to meet the tribe's exorbitant compensation demands. The Act of 1899 in 25 U.S.C. 314 makes specific provision for the method of appraisement by disinterested referees subject to further de novo review by either party if dissatisfied.

Where, as here, the refusal of tribal consent is predicated entirely on a dispute as to the amount of compensation for past and future occupancy, the Secretary abuses its discretion in refusing to accept the application for filing, rather than proceeding to an appropriate determination of compensation under Section 314. Attached as Exhibit D is a copy of the land appraisal prepared by Appellant's M.A.I. appraiser showing just compensation at $20,858. Attached as Exhibit E is a letter written on behalf of the tribe demanding compensation which converted to present value exceeds one million dollars for a right of way lease which expires in 40 years.

IV. Other reasons given for rejecting the application are erroneous.

If the reason for rejecting the application is that it should be made under the 1948 Act, such reason is erroneous. The Department cannot repeal the 1899 Act any more than it can refuse to observe and administer it. Congress declined to remove this legislation (i.e., the method of the 1899 Act) from the statute books.

As will be seen from the application itself, the stipulations required by the regulations in connection with the 1899 Act were all agreed to. See 25 CFR 161.23 and the attached application. Regulation 161.23 specifies that grants under the 1899 Act will be subject to "other pertinent sections" of part 161, but the "stipulations" of 161.5 are not "other sections", and nowhere do the regulations specify what "other" sections are

pertinent. Additionally many of the stipulations of 161.5 are duplicative of those found in 161.23, and others have to do with original construction, obviously not pertinent here. Therefore, by the Department's own regulations the stipulations of 161.5 are not applicable to grants under the Act of 1899.

V. The Act of 1899 can apply to railroads already constructed at the time of passage of the Act.

It is anticipated that the Tribe will contend that the Act of 1899 cannot apply to a railroad already constructed at the passage of the Act. Such arguments are based on interpretations of the language of the Act. All such linguistic arguments were laid to rest by the holding of the 9th Circuit in United States of America v. Southern Pacific Transportation Company, (CA 9-1976) 543 F.2d 676, where the court reviewed such contentions and held:

> "We do not find much assistance in this language (of the Act), however. Some of the provisions cited do not refer to construction at all but only specify conditions precedent . . . This provision by itself (for filing of maps and payment of compensation) does not preclude the grant's becoming effective long after construction of the railroad.
>
> Other provisions seem to presume that the railroad is to be constructed in the future without necessarily precluding application of the Act to an existing railroad."

Thus such contentions have been rejected by the 9th Circuit.

Although the court in the Walker River Paiute case declined to rule directly, the court's opinion is heavily suggestive that the Act should apply. For example, the court notes that the

General Right of Way Act of 1875 has been held to apply to railroads constructed before 1875, citing Rio Grande R. R. v. Stringham (1910) 38 Utah 113, 110 Pac. 868, affirmed, 239 U.S. 44 (1915).

More importantly, the 9th Circuit seems to say that all other considerations militate toward applicability of the Act. The court noted:

> "The only alternatives to obtaining a right-of-way under the 1899 Act would be to seek a special act of Congress or to forego a right-of-way altogether. The first alternative is inconsistent with the purpose of the two general railroad right-of-way acts; to free Congress from the burden of applications for special right-of-way legislation. See H.R. Rep. No. 1896, 55th Cong., 3d Sess. 1 (1899). The second is contrary to the congressional policy of encouraging western settlement by promoting the extension of railroads."

In short, the court appears to hold that if the Act of 1899 does not apply, Congressional policy will be frustrated. It follows that the Act should be available for already constructed lines.

VI. Conclusion.

The application and map of definite location of Burlington Northern Inc. for right of way through tribal lands in the Swinomish Indian Reservation, Washington, should be accepted for filing and acted upon by the Department.

Respectfully submitted,

L. D. Silvernale

Lawrence D. Silvernale
350 Central Building
Seattle, Washington 98104

Real Property Mgmt.
Tenure & Mgmt.
Pending Right-of-way
Swinomish General

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Western Washington Agency
3006 Colby Ave., Federal Building
Everett, Washington 98201

October 17, 1978

Burlington Northern Railroad Company
Attention: Lawrence D. Silvernale,
Associate Regional Counsel
350 Central Building
Seattle, WA 98104

Gentlemen:

The Swinomish Indian Senate in session on October 3, 1978, resolved that the Swinomish Indian Tribal Community refuses to authorize the Secretary of the Interior to grant an easement for the right-of-way, applied for by the Burlington Northern Railroad Company. As tribal consent is required under both the law and the regulations, we have no choice but to deny the application. Accordingly, by copy of this letter, we will notify our Portland Area Office to return your original application and attachments thereto without approval.

Sincerely yours,

Superintendent

EXHIBIT A

CONSERVE AMERICA'S ENERGY

Save Energy and You Serve America!

BURLINGTON NORTHERN

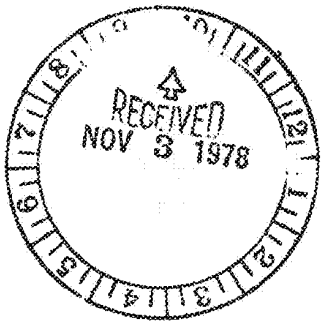
Lawrence D. Silvernale 625-6444
Associate Regional Counsel

George C. Inman, Jr. 625-6440
Robert C. Williams 625-6447
Assistant Regional Counsel

Gerald A. Troy 625-6448
General Attorney

Woodrow L. Taylor, 625-6441
Regional Counsel

November 2, 1978



Mr. Peter P. Threestars
Superintendent
Western Washington Agency
Bureau of Indian Affairs
Federal Building
Everett, Washington 98201

Dear Mr. Threestars:

Please refer to your letter of October 17, 1978, to Burlington Northern Railroad Company, Attention Lawrence D. Silvernale, Associate Regional Counsel, your file Real Property Management, Tenure and Management, Pending Right of Way, Swinomish General. As you know, I am attorney for Burlington Northern Inc. with offices at 350 Central Building, Seattle, Washington 98104. My telephone number is 206-625-6444. All further correspondence and communication in this matter should be with me.

Pursuant to 25 CFR 2.3 and following sections, Burlington Northern Inc. hereby appeals to the Area Director the decision set forth in your letter of October 17, 1978, to reject for filing the application for grant of right of way to Burlington Northern Inc. through tribal lands in the Swinomish Indian Reservation. In due course we will file our appeal with the Area Director, the original certificate of service pertaining to this notice of appeal, and the duplicate originals of the tendered application and accompanying documents if they are returned by the Area Director.

Will you please stamp as "Received" the attached copy of this letter and return it to me in the enclosed stamped, self-addressed envelope. Please telephone me if you should wish to discuss this matter.

Very truly yours,

L. D. Silvernale

Lawrence D. Silvernale
Associate Regional Counsel

EXHIBIT B

LDS/mb

Encl.
cc: Area Director, Portland, Bureau of Indian Affairs
Office of the Solicitor, Portland Region
Ms. Sharon K. Eads, Native American Rights Fund
Mr. Peter J. Wilke, Swinomish Tribal Community

[illegible] Seattle, Washington 98104

DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

In the Matter of Appeal of)
Burlington Northern Inc. from)
Decision Refusing to File an)
Application for Right of Way)
Through the Swinomish Indian)
Reservation, Washington.)
)

AFFADAVIT OF MAILING

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

The undersigned, being first duly sworn on oath states that on November 2, 1978, she deposited in the mails of the United States of America properly stamped and addressed envelopes, certified mail with return receipt requested, containing the notice of appeal of Burlington Northern Inc. in the above matter, addressed to the following persons:

Mr. Peter P. Threestars
Western Washington Agency
Bureau of Indian Affairs
Everett, Washington 98201

Area Director
Bureau of Indian Affairs
P.O. Box 3621
Portland, Oregon 97208

Ms. Sharon K. Eads
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

Maria G. Bates

SUBSCRIBED AND SWORN TO before me this 9th day of November, 1978.

L. D. Liberman
Notary Public in and for the State
of Washington, residing at Seattle

EXHIBIT C

John E. Miller

MEMBER—AMERICAN INSTITUTE OF
REAL ESTATE APPRAISERS

PHONE 734-3420
1401 ASTOR AT "J"
BELLINGHAM, WASHINGTON 98225

September 6, 1977

Western Washington Indian Agency
Everett, Washington

RE: Burlington Northern Railway Right of Way
Swinomish Tidelands

Dear Sir:

At the request of Burlington Northern Inc., I have examined and appraised the property occupied by Burlington Northern trackage across tidelands in front of the Swinomish Indian Reservation in Section 2, Township 34 North, Range 2 East, W.M., Skagit County, Washington, for the purpose of determining the current Fair Market Value and damages, if any, as a basis for deposit of estimated consideration pursuant to Title 25 CFR, Section 161.14. As of the date of this letter, I find the value of the lands to be acquired by Burlington Northern to be $20,858. This computation is based upon a right-of-way 60 feet wide and approximatly 3,029 feet long, a total of 4.17 acres

I have determined that the lands remaining will not sustain any severance damages by reason of the location, construction and operation of Burlington Northern, and I have further determined that no damages will result from the survey, if any, for location and construction of said railway.

I have also examined the area of Swinomish Slough which is occupied by Burlington Northern's bridge and approaches, and it is my conclusion that as long as the Slough is burdened with a navigational servitude, the underlying fee has no recognizable market value and the use of the Slough for purposes of construction and operation of a railroad bridge does not damage or diminish the value of the underlying fee in any respect.

I therefore certify that the market value as of the date of this certificate totals ---------- $ 20,858.00 ----------

Very truly yours,

John E. Miller, M.A.I.

JEM:ab

EXHIBIT D

Native American Rights Fund
1506 Broadway • Boulder, Colorado 80302 • (303) 447-8760

Washington Office
1712 N Street, N.W.
Washington, D.C. 20036
(202) 785-4166

Staff Attorneys
Lawrence A. Aschenbrenner
Arlinda F. Locklear
Don B. Miller

Maine Office
173 Main Street
Calais, Maine 04619
(207) 454-2113

Staff Attorneys
Thomas N. Tureen
Dennis M. Montgomery

June 29, 1977

Mr. Lawrence D. Silvernale
Associate Regional Counsel
Burlington Northern, Inc.
350 Central Building
Seattle, Washington 98104

Re: Swinomish Indian Right-of-Way

Dear Mr. Silvernale:

It appears that we are at an impasse. I have discussed the situation again with my client and we have decided to set down the terms of our final offer in one last attempt to avoid needless litigation.

1. Past damages of $350,000;

2. Future right-of-way for a period of 40 years with an option in Burlington Northern to renew for an additional 40 years;

3. Future rent of $38,470 per year for the first five years, reappraisals at five year intervals to adjust the base rent up or down, the minimum rent to be $30,000 per year.

I do not know why my letter of May 13 should have been such a shock to you. The $38,000+ for future rental is most certainly based on the current appraised value of the tribal tidelands in the Swinomish Industrial District of $1 per square foot. It is the figure that we have insisted on throughout our negotiations. We have consistently stated that the Tribal Community would not lease its lands to Burlington Northern for any less than the comparable lands within the Industrial District. The going rate is $1 per square foot, which is supported by a M.A.I. appraisal and we will not accept any less.

I did describe to you how the figure of $600,000 was calculated. It is based on Mr. Miller's appraisal with the modifications indicated in my letter of May 13. In order to reach a compromise resolution in an area that is necessarily difficult to prove with exactitude, the Tribal Community has agreed to accept $350,000 for past damages.

EXHIBIT E

With regard to the Slough, first of all I do not think that it is in Burlington Northern's interest to limit the right-of-way to 3,390 feet. I thought that we all wanted to settle this matter once and for all. If the right-of-way granted by the Tribal Community excluded the Slough and our ownership of it was subsequently confirmed, we would be back negotiating or litigating another trespass claim. Let's resolve this once and for all. Certainly, our claim to ownership of at least the western half of the Slough is well founded simply as a matter of law. Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 n.8 (1970); Choctaw Nation v. Cherokee Nation, 393 F.Supp. 224 (E.D.Okla. 1975). The Tribal Community will not abandon, waive or grant its rights to any lands for which it is not adequately compensated.

I would ask you to consider the consequences of our failure to reach agreement. The title issue seems so clear that little can be gained by litigating. We would wind up in the same position in which we now find ourselves after having expended needless time, energy and resources. The Tribal Community truly believes that this final offer is fair to all concerned. It is based on fair market value for past and future use which you have insisted on from the outset of our negotiations. Although the railroad may be an asset to the Industrial District, the Tribal Community has resolved that the railroad will not be allowed to use tribal lands for any less than the terms presented in this letter. If litigation is initiated and we are successful, the Tribal Community will, in all probability, insist on greater monetary compensation.

The Tribal Community has also indicated that if we are required to resort to the courts, once we are successful in establishing our title we will require that if Burlington Northern stays on the reservation, it must reconstruct part of the railroad line, specifically the bridge span, so that larger ships will have access to the Slough and to the Tribal Community's potential deep water port in the northern part of the reservation fronting on Padilla Bay.

Sincerely yours,

Robert S. Pelcyger

RSP:sal